

that the association entered into and remained in occupation of the said premises with the authority of the defendant as the person in whom the 56/80th undivided share in the said premises is vested in fee simple.

Before they went into occupation of the said premises the association, after various religious ceremonies to ascertain the wishes of the ancestral deities of the clan, were advised by the oracle that the said premises was the most favourable place for the installation and the proper keeping of the ancestral tablets of the deceaseds' kinsmen in the clan and that they should accordingly be installed, cared for and worshipped there. The association thus moved in with the consent of the defendant and have duly, with all religious ceremonial, installed the tablets. They believe that to move out and remove the ancestral tablets would constitute an affront to the deities. The said premises are therefore in use today as a *Kongsi* house.

In the early periods of the history of our law, might seems to some extent to have been confounded with right and actual possession to have been more highly favoured than property or the legal right to possession. Where at the time of the commission of any trespass upon land the owner happened to be out of possession, either by reason of his having been wrongfully ousted or by reason of his having neglected to enter into possession upon the accrual of his title, he seems to have been without remedy for such trespass. In the course of time, however, the injustice of not extending to the right to possession the remedies which were allowed to have possession came to be recognised, and a legal fiction was introduced whereby the party having the right to possession was, upon entry, deemed to have been in possession from the date when his right of entry accrued. The courts, however, did not go the whole length of treating the right to possession as *per se* equivalent to possession. They still required that a plaintiff who seeks to recover damages for a trespass committed while he was out of possession should, before action brought, go through the form of entry or which is equivalent, of making a formal claim (*Clerk & Lindsell* on Torts, 12th Edition, 1149).

One co-owner of land can only bring an action of trespass against the other if he has been actually ousted or dispossessed of the land. Each co-owner is entitled to possession of the whole land, so that if one turns the other off the land or part of it, it is a trespass (*Murray v. Hall* ⁽¹⁾). In *Jacobs v. Seward* ⁽²⁾ it was held that putting a lock on a gate (not kept locked) is not enough. In his judgment Lord Hatherley, the Lord Chancellor, said that even if there had been a finding that the gate was locked, that would not have been sufficient unless it had been

A shown that the plaintiff was excluded by that locking, or that on some occasion when he applied to have it opened it was not opened. Nothing passed between the parties which showed that the intention of putting the lock there was to exclude the co-tenant in common. There was nothing in the circumstances from which the inference of exclusion was to be drawn.

B It is not contested in the present case that the plaintiff has never attempted to enter into occupation of the said premises or any part thereof. Neither the defendant nor the association has ever excluded or prevented the plaintiff from entering the said premises or any part thereof. C Can it be said that the user of the said premises by the association as a *Kongsi* house by itself constitutes actual ouster or dispossession of the plaintiff? I do not think it can. I do not think it can be said that the defendant is using the said premises other than in an ordinary and natural way and in such circumstances there is no trespass.

D The plaintiff's claim is dismissed with costs.

Claim dismissed.

Solicitors: Ong Huck Lim & Co.; Lim Kean Siew & Co.

YONG UNG KAI v. ENTING

[O.C.J. (McGilligan J.) March 13, 1965]

[Sibu — Civil Suit No. 64 of 1964]

Contract — Implied term — Frustration — Whether Law Reform (Frustrated Contracts) Act, 1943 is a statute of general application — Application of Laws Ordinance (Cap. 2).

G The defendant entered into a written agreement with the plaintiff for the sale of timber on land in which a tribe had communal customary rights. In order to cut the timber a licence from the forests department was required. The written agreement did not refer to the necessity of obtaining a licence. The defendant did his best to get a licence but this was refused. On a claim for breach of contract,

H Held: (1) there was an implied term that the sale of the timber was to be subject to the obtaining of the necessary licence;

(2) as the licence was refused the contract became impossible to perform because of frustration and the plaintiff was therefore entitled to the return of moneys advanced by him to the defendant under the terms of the agreement.

I Semble: The Law Reform (Frustrated Contracts) Act, 1943, is a statute of general application and hence by virtue of the Application of Laws Ordinance is in force and of effect in Sarawak.

Cases referred to:—

(1) *Shirlaw v. Southern Foundaries* (1928) Ltd. [1938] 2 K.B. 227.

(2) *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32.

CIVIL SUIT.

S. Sahathevan for the plaintiff.

Defendant in person.

Cur. Adv. Vult.

McGilligan J.: The evidence offered at the hearing of this case was almost ridiculously scanty and inadequate. This is a "timber" case, but far from not being able to see the wood for the trees, it was exceedingly difficult to find any trees (metaphorically speaking). It seems quite possible the court is not in a position to discover the true state of affairs in this matter. However, the court can go only on the evidence before it, and on that evidence I find the facts to be those set out in the following paragraphs.

The defendant, Tuai Rumah Enting, is the representative of, or trustee for, a certain community, that is the people (including himself) of a longhouse (or of more than one longhouses) in the Sungei Rongan area of the Third Division in respect of lands in that area communally owned by the said community, or rather (to state it correctly and as I presume it must be) in respect of lands in that area in which the said community has communal customary rights. These lands I shall from now on call the said lands.

On the 28th day of September 1962 the defendant entered into a written agreement with the plaintiff. That agreement, which was duly executed and stamped, reads as follows:—

"Agreement is hereby made between Mr. Yong Ung Kai of Sungei Bidut and Mr. T. R. Enting anak Medan of Tanjong Latap, both at Sibü for Mr. T. R. Enting's Communal Farming Land Forest at Sungei Rongan, Sibü. They agree to the following terms:

1. All the timbers on the said land are sold to Mr. Yong Ung Kai at a price of \$22,000.00, and the said amount is promised to be paid in three instalments.

2. Mr. Yong Ung Kai pays \$1,000.00 to Mr. T. R. Enting instantly after the signatures, which is taken as part of the said sum, and is confirmed that Mr. T. R. Enting should not sell his land timbers to anybody else.

3. If Mr. T. R. Enting sells the timbers to other person or authority, all the expenses claimed by Mr. Yong Ung Kai should be refunded by Mr. T. R. Enting.

4. Mr. Yong Ung Kai has the full responsibility for the timber business; Mr. T. R. Enting has not the least right to interfere.

The Agreement is signed on the twenty-fifth day of September in the year one thousand nine hundred and sixty-two, at Sibü."

This agreement speaks of the sale to the plaintiff by the defendant of the timber on the said lands, but it is clear from the evidence of both parties as to their intention and conduct that what the plaintiff was buying (or trying to buy) was the right to work, to cut and extract timber standing on the said lands, with a view

A to making such profit as he could from the exercise of that right.

It is true that section 94 of the Evidence Ordinance makes, as between the parties to an instrument, oral evidence of intention not admissible for the purpose of construing the deed or of proving the intention of the parties. This section, however, merely prescribes a rule of evidence, it does not fetter the court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. Here, it is very clear from the circumstances shown to the court that there was no question of the defendant selling already cut timber to the plaintiff, or of his selling certain standing timber which he was himself to cut and deliver to the plaintiff. The agreement was that the defendant should sell to the plaintiff the right to cut and take out certain timber, or to put it another way, that the defendant should sell certain standing timber which it was for the plaintiff himself to cut and extract.

It would seem (again on the evidence before me) that the said lands must be (under the Land Code) native customary land, but it is impossible to decide, from several possible alternatives, in what class of land for the purposes of the Forests Ordinance the said lands are, or in 1962 were. Whatever their class, however, it is common ground between the parties that to work the timber on them a licence (or permit) from the forests department was necessary.

Neither of the parties is a newcomer to the business of the sale and extraction of timber, and both of them must have known, at the time of making the agreement, that it could only be carried out if whatever licence and whatever permission (if the permission of some Government officer was also required) was necessary could be, and was, obtained. In fact a licence or legal permission in some form to fell on the said lands (or on a part of them) has been given to the Hua Syn Sawmill; and the defendant has received \$4,000 from the Hua Syn Sawmill for, presumably, agreeing to their being allowed to cut and take timber from the said lands. When exactly this happened it is not possible to say, but I presume and hold that it happened after the agreement between the plaintiff and the defendant became (as I later find) impossible to perform.

I hold that it was an implied term of the contract between them that performance was subject to the obtaining of any necessary licence and any necessary permission by the defendant. The courts do not, I know, lightly imply terms, but in my opinion the circumstances of this case demand that the term I have just specified be implied in this contract. It must have been in the minds of the parties that the agreement

required the obtaining of a licence and of permission (if that in fact was necessary). MacKinnon L.J. in the case of *Shirlaw v. Southern Foundries (1928) Limited* ⁽¹⁾ said:

"*Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'"

Here I believe that, if some bystander at the making of their agreement had said "Don't forget about the licence and permission you have to get" the parties would have replied, in effect, "Of course not! we know".

I am also satisfied (from the evidence of both parties) that the defendant did his best to get whatever licence or permission was necessary, but failed to do so because of the refusal of the forests department, and also, apparently, because of the position taken by the district officer of the district concerned and by the Resident. From my understanding of the forest laws the licence would have had to be in the name of the plaintiff (though the defendant, as the person in effect holding rights over the said lands, could no doubt have applied for it to be given to the plaintiff). Why the permission of the district officer, or the Resident, should have been necessary it is difficult to say, but the plaintiff did not dispute that it was. As to the licence he himself conceded that it could not be obtained. He said that that was the fault of the forests department.

Because of the failure to obtain the necessary licence (and permission, if that also was required) the agreement became impossible to perform and it has not, in fact or at all, been performed.

The plaintiff now alleges that the defendant, has broken the contract between them, and has claimed, in all, \$21,590.75 for what he calls in his statement of claim "expenses", and has, in addition, claimed general damages.

The "particulars of expenses" given by the plaintiff are these:

1. Hire charges of rails from Tan Ka Hock	\$ 770.00
2. Charges for hiring rails, locomotives and wheeled carts from Wong Tung Ming	7,760.00
3. Payments to defendant, expenses incurred in the entertainment of defendant and travelling expenses	3,986.45
4. Transport charges	85.00
5. Payment made to defendant as deposit on 25th September, 1962	1,000.00
6. Loss of wages to the plaintiff for 23 months at \$300.00 per month	6,900.00
7. Other sundry expenses	1,089.30
Total	<u>\$21,590.75 "</u>

A As I have said he also claims general damages. These could, perhaps, from the standpoint taken by him have been loss of wages incurred during the time he was trying to bring the agreement to fruition. But this is obviously a misconception. I do not see how one can legitimately claim for loss of wages which one, over a certain period, did not earn, because one was engaged on a financial venture. The claim should not be for loss of wages, but for general damages for loss of the profits which might have been made had not the contract been (as the plaintiff alleges) broken by the defendant. In answer to the court the plaintiff put his possible profits at \$200,000 to \$300,000.

B
C I set out these details of the plaintiff's claim only for the sake of convenience and clarity, for it follows from the findings, which I have made, that it was an implied term of the contract between the parties that performance of it was subject to the necessary licence (and permission) being obtained, and that — through no fault of the defendant — the licence (and permission) not being obtainable, the contract became impossible to perform. It follows from these findings that the plaintiff's claim for breach of contract fails.

E He is nevertheless in my opinion entitled to be reimbursed the money he has paid to the defendant in respect of, and because of, the agreement between them, up to the time when it became certain that it was impossible to perform.

F It is difficult to say when precisely that was; the full facts are not before me. I do not know how definite the various refusals to give a licence or permissions were, but both parties seem to have gone on hoping for some time to get a licence despite the refusals. The plaintiff, however, in fact sent back the rails and other things he had hired in the middle of 1963, and according to his account book went on paying out various small sums to the defendant until the end of July 1963. I accept that at the end of July 1963 the parties gave up hope of obtaining a licence (and whatever permission was necessary) and that as between them that was the point when the contract should be regarded as having become impossible to perform.

G
H I consider the plaintiff entitled to the monies advanced by him to the defendant because in my opinion and judgment the Law Reform (Frustrated Contracts) Act, 1943, is a statute of general application, and hence by virtue of the Application of Laws Ordinance in force and of effect in Sarawak. This Act provides that where a contract governed by English law has become impossible of performance or been otherwise frustrated, the following provisions is to apply:

S.1(2). All sums paid or payable to any party in pursuance of the contract before the time when the

parties were so discharged (in this Act referred to as 'the time of discharge') shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be payable:

Even if I were wrong in holding that the Law Reform (Frustrated Contracts) Act, 1943, is a statute of general application, the plaintiff is still entitled to be repaid the monies advanced by him. In the case of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*⁽²⁾ a contract for the sale and purchase of machinery was frustrated by the happening and continuation of the 1939 — 1945 war. It was held that £1,000 paid by the buyers to the sellers at the time of their making the order for the machinery must be returned to them, on the ground that there had been a complete failure of consideration. The headnote summarises correctly, I consider, the basic reasoning of the various learned judgments delivered, and I now quote a part of it:

"The claim of a party who has paid money under a contract, to recover it on the ground that the consideration for which he paid it has wholly failed is not based on any provision in the contract, but arises because in the circumstances the law gives a remedy in quasi-contract to the party who has not got what he bargained for. Although, in the formation of a contract, a promise to do a thing may be the consideration, in dealing with the law of failure of consideration and the right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but its performance."

In that case the contract was frustrated by, became impossible to perform because of a supervening, unforeseen event, whereas in the instant case the contract became impossible to perform because of an event foreseen as possible; but I do not see that that alters the principle concerned, and there was here a complete failure of consideration in the sense given to those words in the quotation just made, and the plaintiff is entitled to be returned the monies paid out by him to the defendant as money had and received by the defendant to the use of the plaintiff.

The plaintiff is only entitled to the return of the \$1,000 at the time of the signing of the agreement and such amount as the court holds he advanced to the defendant under and because of the agreement between them. He cannot recover the amounts expended by him, or for which he is liable, for the hire of rails and locomotives, etcetera (and in any case the fact that he did expend, or is liable for, such amounts was not satisfactorily proved) or for transport charges, or for loss of wages, or for loss of profits.

Now, I accept the account book put in by the plaintiff as genuine, as true and correct and showing payments out actually made. The question is how many of the various amounts shown in the account book to have been expended

A can be said to have been paid to, and received by, the defendant.

All the items in his name are certainly chargeable to him, but I cannot see that anything else is; I cannot say that sums paid to Anbaleng or to Bunkabang or for the hire of speedboat for the plaintiff's own use (as gathered from his evidence) are sums paid to the defendant for the use of plaintiff. I accordingly rule that only the amounts shown by the account book to have been paid to the defendant himself are recoverable from him. The total of these amounts is \$2,585.10.

C The plaintiff is entitled therefore in my judgment to recover \$1,000 plus \$2,585.10, a total of \$3,585.10, and to nothing else, and I accordingly give judgment in favour of the plaintiff against the defendant in the sum of \$3,585.10.

D In the circumstances I think it fair to fix now a sum for costs; I do not consider the plaintiff is entitled to his full taxed costs. I fix costs at the sum of \$350 from which I subtract the \$10 awarded to the defendant on the 16th of February 1965 in respect of costs of an adjournment, and order the defendant to pay \$340 in costs to the plaintiff.

E *Judgment for the plaintiff.*

LIM WAN HOOI v. ISMAIL BIN HASSAN

[O.C.J. (Hashim J.) March 24, 1965]

[Kuantan — Civil Suit No. 23 of 1963]

F *Practice and Procedure — Application to have writ renewed — Application made after expiry of writ and after claim barred by limitation — Civil Law Ordinance, 1956, s. 7(5).*

G In this case the plaintiff applied for an order that a writ be renewed. The action was for damages arising out of the death of one Wong Yang Cheong on May 5, 1961. The writ was filed on November 9, 1963. In October 1964 the plaintiffs applied for substituted service. The hearing of this application was fixed for November 23, 1964 when it was granted.

H Held: as the application was made after expiration of twelve months from the date of the writ and as the claim had become barred by limitation, the application must be refused.

CIVIL SUIT.

H. L. Wigglesworth for the plaintiff.

N. Ramachandran for the defendant.

Cur. Adv. Vult.

I Hashim J.: There are two applications in this matter. One is by the defendant for an order that the writ be set aside under Order 8 rule 1 and the other application is by the plaintiff for an order that the writ be renewed for a period of 6 months also under Order 8 rule 1.

The following facts are not disputed:—